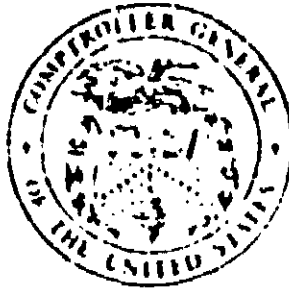


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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-202933

DATE: January 5, 1982

MATTER OF: Salmon River Lumber Company

**DIGEST:**

1. A protest alleging improprieties apparent in a timber sale solicitation must be filed prior to bid opening. When it is so filed with the contracting agency and subsequently filed with GAO within 10 working days of the protester's receipt of notification of adverse agency action, it is timely under GAO Bid Protest Procedures and will be considered.
2. Where neither the Small Business Act, the National Forest Management Act of 1976, nor any applicable regulations mandate that certain timber sales be set aside for small business, the decision not to set aside a sale is within the discretion of the contracting agency and is not subject to GAO review.
3. The protester's burden of proving its case is not met by its unsupported summary statements that the appraisal and profit margin figures used in a timber sale solicitation were unrealistic and misled bidders. Here, the agency provides a reasonable explanation of the methods used in arriving at the appraisal and profit margin figures and notes that these figures were a matter of public record to assist bidders in formulating their bids.
4. The requirement for rock surfacing of timber sale access roads at purchaser's expense does not violate 16 U.S.C. § 535 where the

agency advances a reasonable explanation which shows that the required surface is not of a higher standard than needed for the sale.

5. Where one document relating to a timber sale solicitation process clearly modifies the sale schedule announced in another previously released document, the two documents are not inconsistent.

Salmon River Lumber Company protests the award of any contract as the result of the Turnbull Timber Sale conducted by the Forest Service, U.S. Department of Agriculture. Salmon River, a small business, contends that the Forest Service improperly failed to give adequate consideration to setting aside the sale for small business. Furthermore, Salmon River alleges several deficiencies in the Turnbull Sale solicitation process. For the following reasons we believe the issues raised by Salmon River either are not appropriate for our consideration or are without merit.

#### BACKGROUND

The Turnbull Timber Sale involves a Nezperce National Forest tract in which an estimated 7.6 million board feet of timber will be sold. The Forest Service officially advertised the Turnbull Sale on March 11, 1981, with a bid opening date of April 13.

On March 20, Salmon River protested to the Forest Service, requesting that the Turnbull Sale be withdrawn because the solicitation allegedly contained manufacturing cost appraisal and profit margin figures which were inconsistent with amounts contained in other timber sales advertised during the same period. By letter dated March 30, the Forest Service denied Salmon River's request.

One hour before the April 13 bid opening, Salmon River hand delivered another protest to the Forest Service which restated its previously rejected protest concerning the allegedly deficient appraisal and profit margin figures and raised three new issues. Salmon River (1) questioned the Forest Service's requirement that timber access roads be constructed with rock surfacing; (2) alleged internal inconsistencies in solicitation documents; and (3) argued that

the Forest Service improperly failed to consider setting aside the sale for small business. The protest filed with GAO on April 16 concerned the same issues.

Notwithstanding the protest to the agency, bids were opened as scheduled. Two firms, Salmon River and Wickes Forest Industries, submitted bids and subsequently participated in an oral auction. Wicks was the eventual high bidder and award to that firm is being withheld by the Forest Service pending resolution of this protest.

#### TIMELINESS

As a threshold matter, the Forest Service submits that Salmon River's protest was not timely filed under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981). We do not agree. All of the protest issues involve alleged deficiencies in the solicitation. In order to be timely, therefore, Salmon River was required to file its protest with either the Forest Service or our Office prior to the April 13 bid opening because our Procedures require that issues concerning alleged improprieties in a solicitation, which are apparent prior to bid opening, must be raised prior to that date. , C.F.R. § 21.2(b)(1).

Salmon River did this. It raised the issues involving small business set-aside, road construction, and solicitation inconsistencies in its hand delivered April 13 pre-bid opening protest to the Forest Service, which was followed by a filing of the same protest in our Office 3 days later. Salmon River raised the other issue, concerning appraisal and profit margin figures, even earlier. Because the protest on that issue was denied by the Forest Service in a letter dated March 30, Salmon River was required to file its subsequent protest with our Office within 10 working days of its receipt of that letter 4 C.F.R. § 21.2(a). The protest filed here on April 16 appears to meet that requirement, assuming a reasonable time for transmission of the March 30 letter to Salmon River. We therefore conclude that the protest is timely.

#### SMALL BUSINESS SET-ASIDE

Salmon River's argument that the unrestricted Turnbull Sale should be withdrawn and resolicited as a small business set-aside stems from its belief that, without such a set-aside for this sale, the Forest Service will fall short of

meeting its goal that a certain percentage of all board feet of timber sold be restricted to small business. In this regard, such goals periodically have been established as a matter of Forest Service policy through agreements with the Small Business Administration (SBA). These agreements are procedurally implemented through the provisions of the Forest Service Manual (FSM). Salmon River asserts that the SBA/Forest Service agreements and provisions of the FSM were violated when the Forest Service conducted the Turnbull Sale on an unrestricted basis without proper referral of sale plans to the SBA and without consideration of any SBA advice regarding whether the Turnbull Sale should be restricted to small business concerns.

In the area of Government procurements, we consistently have held that the decision whether a procurement should be set aside for small business generally is within the authority and discretion of the contracting agency. Par Metal Products, Inc., B-190016, September 26, 1977, 77-2 CPD 227. Unless there is a specific statutory or regulatory requirement that a particular procurement or category of procurement be set aside for small business, see, e.g., 15 U.S.C. § 644(j)(Supp. III 1979); Defense Acquisition Regulation § 1-706.1(f) (1976 ed.) and Honolulu Disposal Service, Inc.--Reconsideration, B-200753.2, August 12, 1981, 60 Comp. Gen. \_\_\_, 81-2 CPD 126, this Office will not second guess an agency's decision not to set aside a procurement and has declined to consider protests against such decisions. See, e.g., Francis & Jackson, Associates, B-190023, January 31, 1978, 78-1 CPD 79.

We believe the same approach is appropriate here. There is nothing in the Small Business Act, 15 U.S.C. § 631 (1976), the National Forest Management Act, supra, or any applicable regulations which mandate that certain sales be set aside for small business. In this regard, the agreement between the Forest Service and the SBA concerning small business goals and its implementation in the FSM, are merely expressions of Forest Service departmental policy which do not have the status of mandatory regulations. Gene Peters, 56 Comp. Gen. 459, 464 (1977), 77-1 CPD 225.

Accordingly, we will not review the Forest Service's decision not to set aside the Turnbull Sale for small business.

#### APPRAISAL AND PROFIT MARGIN FIGURES

Salmon River contends that the appraisal methods used to determine the manufacturing cost of the timber subject to the Turnbull Sale were inconsistent with appraisal methods used in

other recent timber sales. Also, Salmon River asserts that the profit margin allowed for the Turnbull Sale was inconsistent with, and lower than, profit margins allowed for other recent sales. The protester argues that these alleged inconsistencies misled bidders as to the realistic costs involved in the Turnbull Sale.

The objective of National Forest timber appraisals is to estimate the fair market value of timber to be sold. Forest Service regulations call for an analytical appraisal of pertinent factors affecting market value, including the consideration of margins for profit, 36 C.F.R. § 223.4(a) (1980). The FSM establishes specific procedures for conducting these appraisals.

The Forest Service reports that the appraisal methods used for determining the Turnbull Sale manufacturing costs were in effect for more than a year prior to the Turnbull Sale, and that all sales during that period were appraised in the same manner. Thus, according to the agency, there were no inconsistencies in appraisal methods used from sale to sale. In this regard, the Forest Service notes that all appraisal figures used in timber sales are published in the FSM which is available to all potential bidders to use in the formulation of their bids.

With regard to inconsistencies in the allowable profit margins from sale to sale, the Forest Service states that profit margins used for timber sales are determined on a periodic basis; they are determined monthly during times of rapid price changes. These margins are changed to reflect actual, experienced market conditions. The profit margin for the Turnbull Sale, which was advertised during a period of low lumber prices, was set at 11 percent, a 2 percent reduction from the 13 percent margin allowed for timber sales advertised a month prior to that time.

In our view, the Forest Service has provided a reasonable explanation of the methods used in arriving at the manufacturing cost appraisal and profit margin figures for the Turnbull Sale. Moreover, these figures were public knowledge and were available to potential bidders to assist them in formulating their bids.

In response to the agency's explanation, Salmon River merely reiterates its contention that the Turnbull Sale appraisal and profit figures were unrealistic and may have misled bidders. Based on our review of the record, however, we conclude

that there is no support for this contention other than Salmon River's summary statements. In this regard, since a protester has the burden of proving its case (see, e.g., Kramer Associates, Inc., B-197178, July 16, 1980, 80-2 CPD 33), and since Salmon River's unsupported statements do not meet this burden, this basis for protest is denied.

#### TIMBER ACCESS ROAD CONSTRUCTION

For the Turnbull Sale, the Forest Service required the construction of a series of rock surfaced roads which provide access to various sections of the Forest tract in which timber is to be harvested and removed. Salmon River contends the requirement that the roads be rock surfaced at the purchaser's expense is unnecessary and contrary to the Environmental Assessment for the Turnbull Sale which calls for a transportation system with "the best balance between (a) least cost, (b) least adverse impact on resources, [and] (c) integration of the forest transportation roads with logging system needs."

Furthermore, Salmon River submits that rock surfacing unnecessarily exceeds the agency's minimum needs because the Forest Service has no immediate plans to use the roads after the completion of the Turnbull Sale's harvesting and removal. Salmon River feels that roads for this sale could be redesigned and constructed satisfactorily with a grass rather than rock surface, at a savings of approximately \$100,000.

In arguing that the requirement for rock surfacing exceeds the actual needs of the Forest Service, Salmon River also submits that 16 U.S.C. § 535 (1976) has been violated. That statute provides, in pertinent part, that:

where roads of a higher standard than that needed in the harvesting and removal of the timber and other products, covered by the particular sale are to be constructed, the purchaser of the national forest timber and other products shall not be required to bear that part of the costs necessary to meet such higher standard."

With regard to the drafting of requirements and specifications, we have held that agencies are primarily responsible for determining the Government's minimum needs, as

well as the methods of accommodating those needs, because their experience places them in the best position to draft appropriate requirements. Consequently, we will not question an agency's determination of its requirements unless there is a clear showing that the determination has no reasonable basis. See, e.g., School for Educational Enrichment, B-199003, October 16, 1980, 80-? CPD 286.

In this case, the Forest Service determined that the road standards and specifications for the Turnbull Sale, including the requirement for rock surfacing, are necessary for the construction of roads which must be able to accommodate heavy logging equipment and related traffic, and to mitigate the expected adverse environmental impact of the timber harvesting and removal. In our view, this justification for requiring roads with rock surfacing has not been shown by Salmon River to clearly lack a reasonable basis. As such, we will not question the Forest Service's decision to require rock surfaced timber access roads.

Thus in our opinion the requirement that the purchaser of the Turnbull Sale timber bear the cost of timber access road construction is reasonable and consistent with the provisions of 16 U.S.C. § 535. See 51 Comp. Gen. 826 (1972).

#### SOLICITATION INCONSISTENCIES

Salmon River alleges that two Forest Service documents, both relating to the Turnbull Sale solicitation process, were not consistent with each other regarding the timetable for the Turnbull Sale. In this regard, the protester refers to a Turnbull Sale Environmental Assessment which stated that the Turnbull Sale would not take place until September 1981, and that significant sale work would not begin until 1982. Salmon River contrasts the Assessment's schedule with one found in the Decision Notice and Finding of No Significant Impact, a document issued approximately four months subsequent to the Assessment, which provided that the Turnbull Sale would be held no later than March 31, 1981, with road construction (a significant sale work) to be completed by November 1, 1981.

We have reviewed the documents in question and believe it is clear from the terms of the Decision Notice's introductory paragraph that it specifically modified and updated the terms of the previously-released Assessment. In this

respect, the Forest Service reports that it specifically included language in the Decision Notice to alert the public to modifications in the Assessment. Consequently, since the Decision Notice's schedule merely amends the Assessment's schedule, there is no inconsistency between these documents. In any event, the Assessment and Decision Notice basically are planning documents which do not formally establish the exact date for a particular timber sale. In this case, the bid opening date for the Turnbull Sale was properly established through advertisement in accordance with Forest Service regulations, 36 C.F.R. § 223.5(a).

The protest is dismissed in part and denied in part.

*Harry R. Chen*  
For the Comptroller General  
of the United States